IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAY 22 1969

HARD SIMPSON,

Petitioner,

vs.

ON OIL COMPANY OF CALIFORNIA,
orporation,

Respondent.

No. 22148

See Vol. 3464

MAY 22 1969

PETITION OF RICHARD SIMPSON FOR REHEARING AND SUGGESTION OF THE APPROPRIATENESS OF A REHEARING IN BANC

MAXWELL KEITH
111 Pine Street #914
San Francisco, California
981-1361

JAMES J. DURYEA
1600 Mills Tower
San Francisco, California
DO 2-7422

Attorneys for petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARD SIMPSON, Petitioner, vs. N OIL COMPANY OF CALIFORNIA, rporation, Respondent.	No. 22148

PETITION OF RICHARD SIMPSON FOR REHEARING AND SUGGESTION OF THE APPROPRIATENESS OF A REHEARING IN BANC

MAXWELL KEITH
111 Pine Street #914
San Francisco, California
981-1361

JAMES J. DURYEA
1600 Mills Tower
San Francisco, California
DO 2-7422

Attorneys for petitioner

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

MISCELLANEOUS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RD SIMPSON, Petitioner, vs. OIL COMPANY OF CALIFORNIA, Respondent.	No. 22148 PETITION OF RICHARD SIMPSON FOR REHEARING AND SUGGESTION OF THE APPROPRIATENESS OF A REHEARING IN BANC

o the Honorable United States Court of Appeals for the Ninth t:

etitioner prays that this court grant a rehearing of its nt filed April 30, 1969, affirming the judgment of the trial below and suggests the appropriateness of this rehearing in or the following reasons:

I. THE DECISION OF THE COURT DISALLOWING PETITIONER FROM OBTAINING THE BENEFIT OF HIS APPELLATE AND JURAL VICTORY IS CONTRADICTORY TO THE RULINGS OF THE SUPREME COURT THAT SUCCESSFUL APPELLANT MUST RECEIVE THE BENEFITS OF THE RULING OF THE APPELLATE COURT.

n Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 , the Supreme Court stated as follows in a private treble action brought under the antitrust laws, at p. 496:

"The theory of the Court of Appeals seems to have been that when a party has

significantly relied upon a clear and established doctrine, and the retrospective application of a newly declared doctrine would upset that justifiable reliance to his substantial injury, considerations of justice and fairness require that the new rule apply prospectively only. Pointing to recent decisions of this Court in the area of the criminal law, the Court of Appeals could see no reason why the considerations which had favored only prospective application in those cases should not be applied as well as in the civil area, especially in a treble damage action. There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. Because we do not believe that this case presents such a situation, we have no occasion to pass upon the theory of the Court of Appeals."

In the area of criminal law the Supreme Court has ruled the appellant in a criminal case is entitled to the benefit any new rule established as a result of his appeal. This the ruling in Stovall v. Denno, 388 U.S. 293 (1967). At 388 301, the Supreme Court stated after holding that petitioners and Gilbert in related cases were entitled to the vacation heir convictions because the state had violated the Fifth Sixth Amendments as interpreted in their appeals in admitting evidence tainted illegal lineup evidence:

> "We recognize that Wade and Gilbert are, therefore, the only victims of pre-trial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions."

This decision was reaffirmed in Desist v. United States, U.S. ___, (1969), 89 S.Ct. 1030, at 1036, fn. 24.

Clearly, if, in the criminal law field, where the Supreme Court indicated no other limitations on the ability to make its isions prospective, this decision is controling in civil igation based on federal statutes which still involves serious stions as to the applicability of purely prospective decisions.

It is respectfully urged that Stovall and Desist answer the erlying question in Hanover; that the courts will never deny a cessful litigant the benefits of his decision in any area of where public policy demands that appeals be encouraged.

II. THE DECISION OF THE COURT WITH REGARD TO THE ORDER GRANTING A NEW TRIAL GIVES THE DEFENDANT THE BENEFITS OF AN ILLEGAL SCHEME IN VIOLATION OF THE ANTITRUST LAWS CONTRARY TO THE SUPREME COURT DECISIONS.

Petitioner respectfully urges that the learned Court's lysis of the damage rule to be applied to service station lease ter cases is erroneous because (1) it allows the defendant the efit of his own wrong, (2) it fails to recognize the economic ue of the business, personal to a dealer who has extended self to create it, consisting of customer loyalty and goodwill (3) is inconsistent with damage law which insures the obtain- of all lost values from a wrong done.

This court has adopted the criteria of Standard Oil Company California v. Moore, 251 F.2d 188 (9th Cir. 1958) to this ion. But the Simpson case involves a lease operation whereas re involved a service station marketer who owned the land and

other capital assets of the business. The scheme presented this court showed that Union Oil Co. issued short-term leases order to control price judgments. It elected not to operate tions with employees entitled to the benefits of social legis-lon enacted by the United States and state legislatures for loyees, including, among others, the unquestioned right to bargain lectively to redress industry grievances. It instead relied individual incentive of the lessee dealer based upon the fits he would earn under the leased operation. Respondent is not entitled now to assert that the lessee is not making profits as shown in his books and records and his income tax rns, and that the dealer's profits are to be measured as a er of law only after considering a fair compensation to him-.

The factual presentation of the petitioner shows the oppres-of dealer-lessees and the destruction of petitioner's entire ness. The short-term lease was the hub of this oppressive me. It is respectfully urged that the Honorable Court should allow damage instructions limited to exchange value under the umstances of transferring short-term leases. This case, thus, n that area of law where the defendant by his own wrong has ented a strict damage formulation from being utilized, and, efore, allows the jury to base its verdict upon all the vant data and render its verdict accordingly. Bigelow v. RKO o Pictures, 327 U.S. 251 (1946). /1 *

The damage formula adopted by the Court is based on exchange e alone. But this is not the only value destroyed by Union

ee Footnote page.

. Co. The customer loyalty and goodwill developed by Simpson faith of future profits was an economic asset and is compensa-. Under Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946) it measurable by loss of profits to Simpson. See Lessig v. ewater Oil Co., 327 F.2d 459 (9th Cir. 1964).

Bigelow allows an award of damages for the loss of all values private antitrust actions. In this it is no different or cial than damage law covering the commission of intentional ts. The Restatement, Torts, specifically allows the recovery the loss of all values when there is an intentional destruction a legally protected interest. Restatement, Torts, §927 (1939).

Value is specifically defined by the Restatement as either change value" or "value to the owner where this is greater than exchange value." Id, at §911.

Restatement, Torts, §911, p. 568 states:

> "Real property may also have a value to the owner greater than its exchange value. Thus a particular location may be valuable to an occupant because of a business reason, as where he has built up good will in a particular neighborhood."

It is respectfully urged that the circumstances of this case not admit a strict Rule of damages limiting value to exchange ue.

III. THIS PETITION SHOULD BE HEARD IN BANC

This probably is the first time in the history of federal islation in which an existing remedy for a litigated wrong has n denied to a successful litigant. In footnote 6 of the

urt's opinion there is set forth those cases which prevent a e-time litigant from obtaining the benefits of his victory. In ch of these cases the plaintiff did not have a remedy for a ong until the decision of the overruling court or the court und no wrong doing but issued a caveat warning. The issue volved removal of a known bar to a remedy. In this case, mpson had an existing federal remedy for the wrong done and e issue was proof of the wrong. The essence of the constitution- framework is that the courts support congressionally enacted gislation allowing a remedy for a wrong done and injury caused. e Louis Pizitz Dry Sands Co. v. Yeldell, 274 U.S. 112 (1927); rthern Securities Co. v. United States, 193 U.S. 197 (1903). s basic principle, it is urged, is raised in this petition.

It is respectfully urged that the decision of the honorable urt does take away an existing remedy under the antitrust laws l that this petition is therefore well within the provisions of deral Rules of Appellate Procedure, Rule 35, allowing a rehear- ; in banc when the proceeding involves a question of exceptional portance.

Dated: May 13, 1969

Respectfully submitted,

MAXWELL KEITH
JAMES DURYEA

By: _____
MAXWELL KEITH

ACKNOWLEDGEMENT OF SERVICE

I hereby acknowledge receipt of the foregoing this _____ of May, 1969.

Brobeck, Phleger & Harrison
Attorneys for Respondent.

Bigelow v. RKO Radio Pictures, at 327 U.S. 264-266:

"Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. See Package Closure Corp. v. Sealright Co., 2 Cir., 141 F.2d 972, 979. That principle is an ancient one, Amory v. Delamirie, 1 Strange 505, and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application. In cases of collision where the offending vessel has violated regulations prescribed by statute, see The Pennsylvania, 19 Wall. 125, 136, 22 L.Ed. 148, and in cases of

confusion of goods, Great Southern Gas & Oil Co. v. Logan Natural Gas & Fuel Co., 6 Cir., 155 F.114, 115; cf. F.W. Woolworth Co. v. N.L.R.B., 2 Cir., 121 F.2d 658, 663, the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable. And in cases where a wrongdoer has incorporated the subject of a plaintiff's patent or trade-mark in a single product to which the defendant has contributed other elements of value or utility, and has derived profits from the sale of the product, this Court has sustained recovery of the full amount of defendant's profits where his own wrongful action has made it impossible for the plaintiff to show in what proportions he and the defendant have contributed to the profits. Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co., 225 U.S. 604, 32 S.Ct. 691, 56 L.Ed. 1222, 41 L.R.A., N.S. 653; Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 36 S.Ct. 269, 60 L.Ed. 629; see also Sheldon v. Metro-Goldwyn

Pictures Corp., 309 U.S. 390, 406, 60 S.Ct. 681, 687, 84 L.Ed. 825.

'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights. Story Parchment Co. v. Paterson Parchment Paper Co., supra, 282 U.S. 565, 51 S.Ct. 251, 75 L.Ed. 544; and see also Palmer v. Connecticut Railway Co., 311 U.S. 544, 559, 61 S.Ct. 379, 384, 85 L.Ed. 336 and cases cited."